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Special Issue

1999 YEAR IN REVIEW

Message From The Chair

By Paul A. Kramer

I write this in early December as the seasons transition, somewhat later than normal, up here in Sacramento. We're in a time of transition at the Bar as well. With the promise of a full revenue stream, the Bar is gearing back up to full operational strength. Here at the Public Law Section, your executive committee's commitment to serving your needs continues as before.

Communication. One of our main themes this year is improving our communications with section members. We can't afford to mail out monthly newsletters, nor would they be very timely. Instead, we're banking on the internet. The Bar has committed to providing us with the "members only" area on our internet site. We plan to use it to provide more timely information to you such as our periodic summaries of pending legislation. We'll also post information about our pending projects and activities and our internet links list. Look for all this at *www.calbar.org/publiclaw*. They say it should be ready by the time you read this.

We intend these improved communications to be a two way street. For the time being, send your comments, corrections and suggestions to us via regular mail or email (publiclaw@hotmail.com); let us know how we can improve our services to you. In my ideal world, just about everything I've said in this column would instead be on the internet, available for you to view weeks, if not months, earlier than the lead times for this Journal permit. That day could be as soon as the Summer.

Public Lawyer of the Year. Every year we select a deserving unsung hero(ine) as our Public Lawyer of the Year. We need your help in identifying this year's recipients. This issue contains a nomination form or, if you want to practice your internet skills, use the electronic nomination form on our internet site.

Projects. One of the dilemmas for our section is finding a common denominator among our members and potential members who range from public defenders to private practitioners representing cities and special districts. Many of you belong to associations with more homogenistic interests (public defenders Assn., County Counsels Assn., City Attorneys Div., ACWA, etc.). Some as state employees, are exempt from MCLE requirements; others obtain their MCLE through their association.

Where does the Public Law Section fit in? We see ourselves as a forum for discussing matters of common interest (such as legal ethics) and matters that fall outside the ranges of those other organizations (or to put it another way, between the cracks). Further, given our position as a member of the State Bar family, we're uniquely qualified to speak to the State Bar on behalf of public lawyers.

Along these lines, our big project for the year is an ethics handbook for public lawyers. Manuela Albuquerque is leading that effort and would welcome any assistance you can provide; send us a note if you'd like to contribute.

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The Ten Most Significant Land Use Decisions of 1999

*By John Eastman**

The state and federal courts were especially active in 1999 in the areas of land use, takings and CEQA. The following is a summary of the ten most significant land use decisions from the past year:

1. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 119 S.Ct. 1624 (1999)

In *Del Monte Dunes*, the Supreme Court not only clarified its earlier decision of *Dolan v. City of Tigard*[1] (which in turn clarified its earlier decision of Nollan v. California Costal Commission2), but also expanded the role of the jury in takings cases.

Del Monte Dunes has a long history. In the earlier case of Del Monte Dunes at *Monterey v. City of Monterey*, 920 F.2d 1496 (9th Cir. 1990), Del Monte Dunes challenged the City of Monterey's rejections of its repeated attempts to develop its 37 acres of oceanfront property with multiple residential units. The Ninth Circuit ruled that Del Monte Dunes's takings challenge was unripe.

The case eventually "ripened" and went to trial. The district court submitted the takings claim to the jury, which awarded Del Monte Dunes $1.45 million.

The Ninth Circuit affirmed, holding in part that a denial of a land use application violates the Fifth Amendment if the denial is not roughly proportional to furthering the legitimate state interest at stake in denying that application. The city appealed to the Supreme Court.

Answering a question that has dogged some courts, the Supreme Court held that the "rough proportionality" test of Dolan,[3] applies only to exactions, not to denials of development permits. The Court explained that the Fifth Amendment addresses two different concerns: preventing government from forcing some people to bear public burdens which justice requires should be borne by the public, and whether a dedication required as a condition of development is proportional to the anticipated impact of the development. Dolan's rough proportionality test concerns only the latter; it does not extend to denials of development permits.

Here, however, the Ninth Circuit did not commit reversible error because the Ninth Circuit's rough proportionality discussion was extraneous to its decision.

Next, the Supreme Court turned its attention to the role of the jury in takings cases. The Court observed that the Seventh Amendment's guarantee of the right to a jury trial extends to statutory claims unknown at common law, if the claims sound basically in tort. Inasmuch as a §1983 claim that seeks legal relief sounds in tort, there is a right to a jury trial in a §1983 suit that seeks damages for a regulatory taking.

The Court proceeded to further refine the role of the jury. Under *Agins v. Town of Tiburon*,[4] a regulatory taking occurs if the application of a general zoning law to a particular property (1) does not substantially advance a legitimate state interest or (2) deprives the owner of economically viable use of the property.

The Court held that there is a right to have a jury decide the latter, "economically viable use" prong of the Agins test in a §1983 regulatory takings challenge (at least in federal court). Predominantly factual issues are usually given to the jury. The Court detetermined that the issue of whether property has been deprived of all economically viable use is predominantly a factual question.

The Court also announced that in a §1983 regulatory takings challenge, there may be a right to have a jury decide the question of whether a governmental land use decision substantially advances a legitimate public interest (at least in federal court), depending on the extent to which this inquiry is factual in a given case. The inquiry of whether a governmental land use decision substantially advances a legitimate public interest is a question of mixed fact and law. Here, the question before the jury was whether the city's decision to reject Del Monte Dunes' particular development application in light of that project's unique history was reasonably related to the justifications asserted by the city. The Court concluded that this was essentially a factual

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inquiry.

The Court declined to make a "precise demarcation of the respective provinces of judge and jury in determining whether a zoning decision substantially advances legitimate government interests."[5]

2. Sierra Club v. San Joaquin LAFCO (Califia Development Group), 21 Cal. 4th 489, 87 Cal. Rptr. 2d 702 (1999)

From the government's perspective, the California Supreme Court's reversal of the Court of Appeal's decision in *Sierra Club v. San Joaquin LAFCO (Califia Development Group)* gives new meaning to the old saw, "if it's too good to be true, it probably isn't."

The San Joaquin County LAFCO approved the annexation of Gold Rush city and Mossdale Village to the city of Lathrop. Under the Cortese Knox Act,[6] any party "may" seek reconsideration of LAFCO resolutions.7 The Sierra Club failed to seek reconsideration of LAFCO's decision to approve the annexation.

The superior court dismissed the mandamus petition on exhaustion of remedies grounds. The Court of Appeal affirmed.

Reversing, the California Supreme Court held that when rehearing or reconsideration of an administrative hearing is available by statute, the failure to request a rehearing or reconsideration does not amount to a failure of exhaustion of remedies. Accordingly, here the Sierra Club exhausted its remedies and therefore could challenge the LAFCO resolution, notwithstanding that the Sierra Club failed to seek reconsideration of the LAFCO decision.

The Court dismissed its earlier, contrary decision of *Alexander v. State Personnel Board*[8] as being outdated, flawed, and counter-intuitive.

The Court qualified its ruling by adding that it may be necessary to seek a rehearing or reconsideration prior to seeking judicial review if reconsideration would be appropriate to raise arguments or introduce evidence not previously brought to the government agency's attention.

3. Breneric Associates v. City of Del Mar, 69 Cal. App. 4th 166, 81 Cal. Rptr. 2d 324 (1999)

Breneric Associates highlights the hazards of bringing a 42 U.S.C. §1983 challenge to an unextraordinary denial of an unextraordinary project.

Breneric Associates applied for design review approval for a two-story addition to an existing single-family residence. The city of Del Mar denied the application, finding that the addition would be inconsistent with the architecture of the existing structure and inharmonious with neighborhood.

The superior court sustained the city's demurrer to the §1983 claim but granted the petition for a writ of mandate on the grounds that there was insufficient evidence to support the city's denial of the permit.

The Court of Appeal reversed. The Court stated that a project may be denied on the grounds that it is aesthetically incompatible with the neighborhood, without supporting expert testimony. Here, the testimony of the neighbors and the opinions of the Design Review Board members were substantial evidence that the project was not harmonious with the neighborhood.

The Court upheld the superior court's sustaining of the city's demurrer to the §1983 claim. The Court held that a substantive due process claim arising out of a land use decision cannot be stated under §1983 if the agency had any significant discretion to deny the permit. The Court explained that a plaintiff cannot state a due process claim under §1983 without alleging a deprivation of a liberty or property interest protected by the Fourteenth Amendment. A protected property interest is defined as "a legitimate claim of entitlement to a benefit." An owner does not possess a legitimate claim of entitlement to a permit if, under state and municipal law, the agency has any significant discretion to deny the permit.

Here, the applicant had no protected property interest because approval of the permit was conditioned on discretionary approval by the city's Design Review Board.

The Court added that a substantive due process claim under §1983 also requires an allegation of facts showing that the agency's action was oppressive, abusive or irrational. Here, no facts were alleged which rose to that level. Rather, there was nothing more than a "run-of-the-mill" dispute between a developer and the city. In arriving at its determination, the Court refused to take into account the city council's motives.

The Court also disposed of the equal protection claim with similar decisiveness. Inasmuch as each property is unique, it is difficult if not impossible to state an equal protection claim with respect to a land use decision involving a design review application. Here, the equal protection claim would have failed in any event because the permit denial bore a rational relationship to the permissible government objective of aesthetic considerations. Further, the council's resolution revealed that the wisdom of its decision was at least fairly debatable.

The Court put the final kibosh on the applicant's suit by holding that a regulatory takings claim under §1983 is unripe without a determination in administrative mandamus[9] that the agency effected a taking. An action for damages under §1983 based on a regulatory taking is premature if the plaintiff had not exhausted the state-provided remedies for receiving just compensation. The state-provided remedy for receiving just compensation in California is an action for administrative mandamus, followed by the seeking of damages under Code of Civil Procedure §1095 or an action for inverse condemnation.

Here, the Court concluded that inasmuch as the applicant had failed to exhaust either of these avenues, the takings claim was unripe.

4. Building Industry Legal Defense Foundation v. Superior Court of Orange County (City of San Juan Capistrano), 72 Cal. App. 4th 1410, 85 Cal. Rptr. 2d 828 (1999)

Building Industry Legal Defense Foundation v. Superior Court of Orange County (City of San Juan Capistrano) placed a new limit on the moratorium powers of cities.

The developer in this case submitted an application for a 356-unit residential tentative tract map. Responding to public opposition, the city council directed the planning staff to study possible amendments to the land use element of the General Plan.

The city ultimately adopted an interim ordinance that directed the Planning Department to suspend the processing of all development applications pending a comprehensive general plan revision.

The developer, joined by the Building Industry Legal Defense Foundation, petitioned for a writ of mandamus. The superior court denied the petition.

The Court of Appeal, reversing, held that an interim ordinance may not be used to prohibit cities from processing development applications, such as applications for a tentative subdivision map. In arriving at its decision, the Court drew a distinction between the procedures for processing development applica-

tions, which are established by state law, and uses of land, which cities may regulate under their police powers.

The Court explained that an application for a tentative subdivision map may start the wheels of project review turning, but does not confer a vested right to complete the project. In any event, a tentative subdivision map application may always be denied on the grounds that the map would be inconsistent with the general plan.

5. Mills Land & Water Company v. City of Huntington Beach, 75 Cal. App. 4th 249, 89 Cal. Rptr. 2d 52 (1999)

Given the recent trend in regulatory takings cases away from the Agins[10] test and toward a case-by-case approach,[11] bright lines in this area of the law are becoming fewer and farther between. A bright line of sorts, however, was demarcated in *Mills Land*.

In 1978, the Mills Land & Water Company applied for a general plan amendment to develop its 23 undeveloped acres. The city of Huntington Beach denied the application.

The following year, the California Coastal Commission refused to certify the city's Land Use Plan ("LUP"), on the grounds that the state Department of Fish & Game considered the Mills Land parcel to be wetlands. The city resubmitted its LUP to the Coastal Commission in 1982. In 1986, the city adopted a revised LUP, which designated the parcel "conservation." The Coastal Commission certified the LUP that same year.

Mills Land applied for approval to build a light-industrial office in 1989. Inasmuch as the parcel was designated "conservation," the city refused to process the application without a LUP amendment.

The city brought the zoning of parcels into conformance with the LUP by zoning the parcel "CC" (Coastal Conservation) in 1990. In 1992, the Coastal Commission approved this zone change on the condition that the city require the dedication of the property for wetlands conservation. Since the city failed to act within six months, the Coastal Commission's conditional approval expired.

The city re-adopted the CC zone change in 1994. In 1995, the Coastal Commission again required the dedication of the property for conservation. The city imposed this requirement as a condition to the CC zone change in 1996.

The superior court sustained the city's demurrer without leave to amend. Reversing, the Court of Appeal proclaimed that the fact that it takes nearly 20 years for a city to obtain the necessary Coastal Commission approvals that would allow the development of private property in the Coastal Zone may constitute a temporary regulatory taking. The Court cautioned that at some point, a city's interest in orderly development must yield to the owner's right to use the property for an economically viable purpose. Here, whether that line was crossed was a factual issue that could not be resolved on demurrer.

The Court dismissed the city's ripeness challenge for the reason that ripeness is irrelevant if the claim is that the agency effected a temporary regulatory taking by failing to act within a reasonable time.

Mills Land is of concern to municipalities not because the Court was swayed by the two decades of delay, but because the Court left the door open to an award of damages against a city when the lion's share of the delay was attributable to state agencies and, to a lesser extent, the applicant.

6. Fall River Wild Trout Foundation v. Shasta County (Fall River Ranches), 70 Cal. App. 4th 482, 82 Cal. Rptr. 2d 705 (1999)

A "trustee agency" under CEQA is a state agency with jurisdiction over certain natural resources that would be affected by the project, such as the Department of Fish and Game.[12] Fall River reveals that a lead agency's failure to provide the notice required by CEQA — including the easily-overlooked notice to trustee agencies — may be fatal.

In *Fall River*, the County of Shasta adopted a mitigated negative declaration for a zone change and tentative map that would allow increased residential development. The county, however, failed to comply with CEQA's requirement of notifying the Department of Fish and Game, a trustee agency.

The county opposed the lawsuit on the grounds that the petitioner, which failed to oppose the project before the county, had not exhausted its administrative remedies. However, the Court of Appeal responded that CEQA's exhaustion requirement[13] is excused if the lead agency failed to provide the notice required by CEQA. This rule, the Court reasoned, would ensure that relevant information is considered at all stages in the CEQA review process.

The Court declared that environmental and project approvals may be set aside if the lead agency failed to provide notice to a trustee agency and the lack of notice resulted in a failure to elicit a response from the trustee agency. In that situation, no showing need be made that the noticing error was prejudicial; the mere fact that information was omitted from the environmental review process constitutes prejudice. Here, the county's failure to send the mitigated negative declaration to the Department of Fish and Game deprived the county of informed public participation and informed decision-making.

7. Mervyn's v. Reyes (Lewis), 69 Cal. App. 4th 93, 81 Cal. Rptr. 2d 148 (1999)

In 1990, the city of Hayward's General Plan was amended to change the land use designation of property owned by Mervyn's from industrial to open space, parks and recreation. In 1996, the real party in interest circulated an initiative petition which proposed an ordinance to enshrine the 1990 General Plan amendments. The initiative petition did not include the actual text of the General Plan policies that would be affected or the General Plan policies map, consisting of approximately 17 pages.

The city clerk certified the initiative petition. Mervyn's filed suit to challenge the initiative petition. The city council subsequently voted to adopt the ordinance proposed in the initiative petition. The superior court upheld all but one section of the ordinance (and therefore awarded Mervyn's only 15 percent of its attorney's fees). Mervyn's appealed.

The Court of Appeal reversed. The Court held that an initiative petition which proposes an ordinance to amend a general plan must include the full text of the provisions of the general plan amended by the ordinance. Under Elections Code §9201, the text of a proposed ordinance must be included in the initiative petition. The purpose of this "full text requirement" is to enable voters to make an intelligent decision and to avoid confusion, the Court explained.

Here, the initiative petition referred to, but did not actually contain, the various provisions of the General Policies Plan of the city which were enacted by the ordinance. The Court believed that this prevented persons who were evaluating whether to sign the initiative petition from being advised as to which laws were being challenged, and which would remain the same. The initiative peti-

tion therefore did not substantially comply with Elections Code §9201, and the city council had a ministerial duty to reject the ordinance proposed therein.

The Court denied Mervyn's its attorney's fees under the private attorney general doctrine[14] because Mervyn's private, financial stake in the ligation was a sufficient motivation for Mervyn's to file suit.

8. Toigo v. Town of Ross, 70 Cal. App. 4th 309, 82 Cal. Rptr. 2d 649 (1999)

Like Mick Jagger, Toigo reminds developers that they can't always get what they want — and to get what they need, they may need to try harder.

Toigo owned 36 rural, hillside acres, designated in the Town of Ross's General Plan as Very Low Density. In 1991, the town denied Toigo's application to subdivide the property into five residential lots, primarily because the project was inconsistent with the open space element of the General Plan. The town council made a finding that a project similar to an alternative project in the Environmental Impact Report (EIR) would be consistent with the open space element.

In 1994, Toigo again attempted to subdivide the property into five residential lots. Toigo's application was deemed complete in June 1995. The town denied the application in August 1995. The town council found that the project would result in worse environmental impacts than the earlier 1991 project, and that the project was inconsistent with the General Plan and other local land use requirements.

In December 1995, the town amended the zoning ordinance, which had the effect of increasing the minimum lot size of Toigo's property from five to ten acres.

The superior court sustained the town's demurrer as to Toigo's estoppel claim and granted the Town's summary judgment motion on Toigo's remaining claims. On appeal, Toigo raised numerous arguments, only the most pertinent of which will be reviewed here.

Toigo asserted that it should have acquired a vested right to a minimum lot size standard of ten acres, because if the town had not unduly delayed its decision on the project, Toigo's application should have been approved before December 1995, when the Town increased the minimum lot size standard from five acres to ten acres. The Court of Appeal rejected this argument because the decision on the project was made within the time limits mandated by the Permit Streamlining Act.[15]

The Court also rejected Toigo's argument that the town was estopped from denying its application, on the grounds that in denying Toigo's earlier, 1991 project, the council made a finding that a project similar to an alternative project in the EIR would be consistent with the open space policies of the General Plan. The Court reasoned that such a general finding by the council could not have misled Toigo into reasonably believing that its 1994 proposal would necessarily comply with the Town's land use standards. A developer seeking to establish estoppel against the government in a land use case faces "daunting odds," the Court added.

Further, the Court stated that estoppel claims in the land use context were no different from vested rights claims. Just as the right to complete a project cannot vest until the issuance of a building permit (or functional equivalent), neither can estoppel apply to situations in which no building permit has been issued. Here, no permits had been issued to Toigo, nor was the alternative project in the EIR the functional equivalent of a permit.

Turning to the ripeness claim, the Court recited that a case is not ripe if the agency has not arrived at a final, definitive position as to how it would apply the regulation to the property in question. The Court announced that the "futility" exception to the ripeness doctrine cannot be demonstrated if the general plan does not preclude all development, and the developer could have proposed another project that would have conformed to the general plan (or at least did not require such drastic modifications as a general plan amendment).

Here, the town demonstrated to the Court's satisfaction that it had not made a final decision regarding the scope of development that would be allowed on Toigo's property. Further, Toigo did not propose any other projects after its application was denied in 1995. This was sufficient for the trial court to find that Toigo's taking claims were not ripe.

The Court added that a taking is not an all-or-nothing proposition—government agencies are not required to permit development to the full extent desired by the owner.

The Court devoted the remainder of its opinion to dispelling Toigo's arguments that there were material issues of fact regarding the extent to which development would have been allowed if Toigo had submitted an application for a project which did not have greater environmental impacts than its 1991 project, and which did not violate the General Plan.

9. Bauer v. City of San Diego, 75 Cal. App. 4th 1281, 89 Cal. Rptr. 2d 795 (1999)

Bauer operated a liquor store for 40 years. In 1995, San Diego amended its zoning ordinance to make liquor stores a conditionally permitted use, rendering Bauer's business a legal non-conforming use.[16] Two years later, the state suspended Bauer's liquor license for 60 days for selling alcohol to a minor.

For purposes of determining whether a legal non-conforming use has been lost, San Diego's zoning ordinance defined "cessation of continuous operation" as including a suspension of a liquor license for thirty days or more.

Without affording Bauer an opportunity for a hearing, city staff determined that the suspension of Bauer's license constituted a cessation of continuous operation, and directed Bauer to apply for a CUP if she wished to resume the selling of liquor.

After a hearing, the city refused to issue a CUP. Bauer was not allowed to raise the issue of whether her ABC license suspension constituted a cessation of continuous operation.

The Court of Appeal reversed the superior court's affirmation of the city's action. The Court stated that government agencies have limited power to revoke a legal non-conforming use. Equating legal non-conforming status with a conditional use permit, the Court explained that a permittee that incurred substantial expense and acted in reliance on the permit acquires a vested right. A vested right may not be revoked without due process — namely, notice and a hearing. In addition, substantial evidence must support the revocation.

At first blush, Bauer stands for the rather ordinary proposition that a city may not determine that a business has lost its status as a legal non-conforming use due to cessation of continuous operation, without providing pre-revocation due process. But there is more to Bauer than meets the eye. The revocation of the legal non-conforming status in Bauer did not involve the exercise of any real discretion by staff; rather, staff treated Bauer's liquor license suspension as an undisputed fact (which it was), and dutifully proceeded to revoke Bauer's legal non-conforming status in light of the only reasonable interpretation that the zoning ordinance would bear. Bauer therefore serves as a reminder that public agencies should err on the side of providing due process prior to revoking any vested property rights, even if the revocation involves ministerial action based on undisputed factual findings.

10. Sunset Drive Corporation v. City of Redlands, 73 Cal. App. 4th 215, 86 Cal. Rptr. 2d 209 (1999)

Most land use professionals know that under state law, an EIR must be certified by the lead agency within one year from the date that the application is complete.[17] Many land use professionals fail to take this requirement seriously. *Sunset Drive* should change their minds.

In November 1992, the city of Redlands determined that the Sunset Drive Corporation's application to develop a low-income housing project was complete, and that the project would require an EIR. In January 1994, Sunset Drive submitted its own draft EIR. city staff rejected it in March 1994. In March 1995, Sunset Drive submitted a revised draft EIR. Staff rejected that, too.

After submitting a third draft EIR in August 1995, Sunset Drive began demanding that the city either approve it or inform Sunset Drive as to how to correct its deficiencies. The city did neither.

Sunset Drive filed a petition for writ of mandate in 1996. The superior court sustained the city's demurrer without leave to amend. Reversing, the Court of Appeal made the following pronouncements:

1 The one-year deadline of Public Resources Code §21151.5 for certifying an EIR is mandatory, not directory. In a new twist to the mandatory/directory dichotomy, the Court explained that the terms "mandatory" and "directory" do not refer to whether the requirement is permissive or obligatory, but merely denote whether the failure to comply with that procedural step will invalidate the government action.

2 That an applicant refuses to revise, or is incapable of revising, a draft EIR to meet the lead agency's requirements does not excuse the lead agency from the requirement of certifying the EIR within the one-year period.

3 The lead agency cannot avoid the one-year rule by rejecting the EIR on the grounds that it is inadequate. The ultimate responsibility for preparing an EIR falls on the lead agency. The lead agency has a variety of means of having the EIR prepared, only one of which is for the applicant's consultant to prepare it. If the applicant's draft is inadequate and the applicant is incapable of revising the draft to satisfy the agency, the agency must find some other means of completing the EIR.

4 A lead agency that fails to certify an EIR within the one-year period may be liable for damages under 42 U.S.C. §1983.

Endnotes

1 *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309 (1994).

2 *Nollan v. California Coastal Commission*, 483 U.S. 825, 831, 107 S.Ct. 3141 (1987).

3 *Dolan* held in part that there need be only a rough proportionality between dedications required as a condition of land use approval and the impact of the development. *Dolan* answered the question left open in *Nollan* as to how precise a fit, or "nexus," is required between the required dedication and the impact of the development.

4 447 U.S. 255, 100 S.Ct. 2138 (1980).

5 119 S.Ct. at 1644.

6 Government Code §56000 et seq.

7 Government Code §56857, subdivision (a).

8 22 Cal.2d 198 (1943).

9 Code of Civil Procedure §1094.5.

10 *Agins v. Town of Tiburon*, 447 U.S. 255, 100 S.Ct. 2138 (1980).

11 See, e.g., *Kavanau v. Santa Monica Rent Control Board*, 16 Cal. 4th 761, 66 Cal. Rptr. 2d 672 (1997).

12 CEQA Guidelines §15386.

13 Public Resources Code §21177.

14 Code of Civil Procedure §1021.5.

15 Government Code §65920 *et seq*.

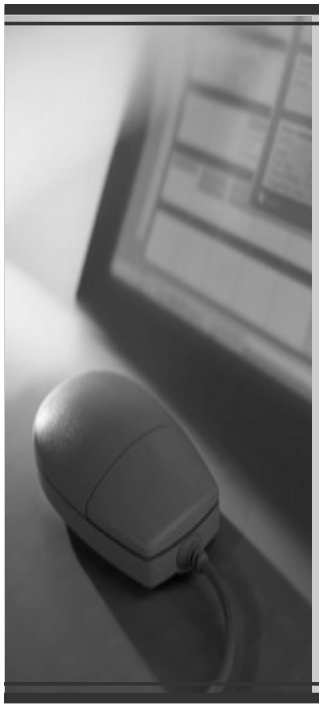
16 The Court defined "legal non-conforming use" as a use which lawfully existed before a zoning ordinance became effective and which is not in conformity with the ordinance after it became effective.

17 Public Resources Code §21151.5; CEQA Guidelines §15108.

* *John Eastman is the Assistant City Attorney for the City of Redondo Beach.*

Editor's Note

This issue of the Public Law Journal marks the "retirement" of former Editor Mark Boehme, Assistant City Attorney of Concord, who has published this Journal for the last several years, through funding crises and numerous other challenges. The Editor would like to extend her personal thanks for a job well done, and also, for all of the on-the-job training and helpful advice.



— The Public Law Section —

Increasing Access to Internet Legal Resources

The Public Law Section was awarded a grant from the Foundation of the State Bar to develop an Internet site which will assist lawyers and non-lawyers alike, listing over 500 websites which provide access to legal groups such as racial, religious, and political minorities. The website, when fully developed, will also contain lists of addresses for Internet search engines and directories and searchable versions of the United States and California Constitutions, statutes and cases. Moreover, the site will contain information on reaching the various legislative branches of the state and federal government. Please check the California State Bar website at *www.calbar.org* for further information on this exciting project.

MCLE SELF-ASSESSMENT TEST

1. By holding that there need be only a rough proportionality between dedications required as a condition of land use approval and the impact of the development, *Dolan v. City of Tigard* answered the question left open by the Supreme Court in *Nollan v. California Coastal Commission* as to how precise a fit, or "nexus," is required between the required dedication and the impact of the development.

   ❑ True ❑ False

2. Under *Agins v.Town of Tiburon*, a taking occurs if the application of a zoning law (1) does not substantially advance a legitimate interest or (2) deprives the owner of economically viable use of property.

   ❑ True ❑ False

3. The issue of whether property has been deprived of all economically viable use is always determined by the court, not the jury.

   ❑ True ❑ False

4. The "rough proportionality" test of *Dolan v. City of Tigard* applies to denials of development permits.

   ❑ True ❑ False

5. When rehearing or reconsideration of an administrative hearing is available by statute, the failure to request a rehearing or reconsideration amounts to a failure of exhaustion of remedies.

   ❑ True ❑ False

6. A local agency may deny a development project on the grounds that the project is aesthetically incompatible with the neighborhood only if the denial is based on supporting expert testimony.

   ❑ True ❑ False

7. A substantive due process claim under §1983 does not require an allegation of facts showing that an agency's action was oppressive, abusive or irrational.

   ❑ True ❑ False

8. If an agency has significant discretion to deny a land use permit, a substantive due process claim under §1983 cannot be stated.

   ❑ True ❑ False

9. A regulatory takings claim under 42 U.S.C. §1983 is unripe in state court without a determination in administrative mandamus that the agency effected a taking.

   ❑ True ❑ False

10. An interim ordinance may be used to prohibit cities from processing a development application.

    ❑ True ❑ False

11. *Mills Land & Water Co. v. City of Huntington Beach* holds that a city can never be liable for damages if a processing delay is caused by another public entity.

    ❑ True ❑ False

12. A lead agency's failure to provide notice to trustee agencies as required by CEQA may be fatal if the lack of notice resulted in a failure to elicit a response from the trustee agency.

    ❑ True ❑ False

13. An initiative petition which proposes an ordinance to amend a general plan need not include the full text of the provisions of the general plan amended by the ordinance, if the petition contains an adequate summary of those provisions.

    ❑ True ❑ False

14. Estoppel cannot apply to situations in which no building permit has been issued.

    ❑ True ❑ False

15. Under *Toigo v. Town of Ross*, the "futility" exception was permitted, since it was shown that the general plan precluded all development.

    ❑ True ❑ False

16. Notice and hearing must be provided prior to the revocation of a legal non-conforming use.

    ❑ True ❑ False

17. When a revocation of a vested right involves only ministerial action, no due process is required.

    ❑ True ❑ False

18. An EIR generally must be certified within one year from the date that application is accepted as, or deemed, complete.

    ❑ True ❑ False

19. A lead agency that fails to certify an EIR within the required one-year period may be liable for damages under 42 U.S.C. §1983.

    ❑ True ❑ False

20. If an applicant refuses to revise a draft EIR, a public agency is excused from the one-year requirement for certifying EIRs.

    ❑ True ❑ False

1999 Legislative Wrap Up On Legislation Of Interest To Public Law Practitioners

*By Debra A. Greenfield**

During the past year the Legislative Subcommittee of the Public Law Section Executive Committee has reviewed and reported on legislation and administrative or state agency actions which would be of interest to members of the Section. Where appropriate, the Executive Committee may take a position on a particular item. The purpose of this article is to report on bills and actions that were reviewed by the Section, briefly summarize their provisions and report their outcome. Because this is the conclusion of the first half of the current two-year session of the California legislature, some bills remain active pending final action next year.

The bills reported here are those that were finally acted on or remain active, and continue to contain provisions of interest to the Section.

If you desire to review any bill on the list you may do so by following the instructions provided in the Summer 1999 Public Law Journal article entitled, "Using the Internet for Legal Research" or by simply starting your search at the California Legislative Counsel's World Wide Website at http://www.leginfo.ca.gov/bilinfo.html

The bills and actions of interest are as follows:

SB 48 (Sher) – Public Records Disclosure. Vetoed by Governor

This bill would have provided for an appeal to the Attorney General of a denial of a request for public records under the California Public Records Act, and a process for the Attorney General to respond. It also would have established penalties for noncompliance with the Act.

SB 755 (Hayden) – California Environmental Quality Act. In Assembly Appropriations Committee

Updates the California Environmental Quality Act (CEQA), and in particular, the role the Environmental Impact Report plays in decisions regarding projects that may have significant environmental effects.

SB 1016 (Bowen) – Employee Computer Records. Vetoed by Governor

Would have prohibited an employer from secretly monitoring the electronic mail or other personal computer records generated by an employee without first advising the employee of the employer's policy allowing review of such files.

California Law Revision Commission

The California Law Revision Commission is examining whether controls are needed on the ability of private utilities to condemn properties. The Executive Committee has a watch position. More information can be reviewed on this matter by contacting the Commission at 650 494-1335 or on the Internet at: http://www.clrc.ca.gov

Continuing Updates of Public Law Legislation

The Section's Legislation Subcommittee reviews legislation throughout the year. Look for periodic summaries of the significant legislation, plus other bills of interest to public lawyers on the Section's website at *www.calbar.org/publiclaw*

* *Debra A. Greenfield is counsel for the San Diego Association of Governments and serves as chair of the Public Law Section's Legislative Subcommittee.*

GET THERE THE EASY WAY!

Research Links *for* Public Lawyers

Public Law Section members may email the Section at **publiclaw@hotmail.com** and request a free list of links to over 500 World Wide Web, Gopher and FTP sites, containing information on transportation, environment, air quality, natural resources, housing, geographic information systems (GIS), demographics, economics, statutory and regulatory law, legislation, government finance and management, among other topics of interest to public lawyers. Please include a request for "public law links" and include your name and State Bar number, and the links will be emailed back to you.

1999 PUBLIC LAWYER OF THE YEAR

– *Joanne Speers* –

The Public Law Section was pleased to announce its selection of JoAnne Speers as its 1999 Public Lawyer of the Year. The award was presented to Ms. Speers by Chief Justice Ronald George during the Section's reception on October 2, 1999 at the State Bar's Annual Meeting in Long Beach. The Public Lawyer of the Year award is given annually by the Public Law Section to a public law practitioner who has quietly excelled in his or her public service. Ms. Speers, who has served as General Counsel for the League of California Cities for the last ten years, exemplifies these qualities and has earned the respect and admiration of those who have worked with her. The text of the Chief Justice's and Ms. Speers' remarks at the reception appears below.

The Public Law Section thanks MBNA for its generosity and support for making the award ceremony possible.

Introductory Remarks of Chief Justice Ronald George

"Good afternoon. I am very pleased to be here to participate in the presentation of this award to the Public Lawyer of the Year. The recipient, JoAnne Speers, has a background that exemplifies the essential service to our state provided by public attorneys in our state's legal and governmental system.

Our government structures depend on the contributions of public lawyers who provide the legal knowledge, expertise, and guidance that assist every sector of government in performing the public's business. Ms. Speer's career provides an excellent example of the key role that such lawyers play.

She has served as General Counsel of the League of California Cities for 10 years, providing in-house counsel assistance to city attorneys across California. Her expertise in the area is reflected in her work updating the California Municipal Law Handbook, her authorship of the City Attorney's Newsletter, and her staff support to State Bar training programs that help others to develop the necessary skills to serve as city attorneys. She also serves as the Assistant Director for Customer Services, overseeing the customer service unit that includes the staff of the League of California Cities' functional departments.

Perhaps the best reflection of the diversity of interests in which JoAnne Speers has developed a working knowledge is to note some of the projects under development by the Institute for Local Self Government, for which she serves as Executive Director. They include regulatory takings, public confidence and government, and arts in the community.

I will not digress into a discussion of regulatory takings and arts in the community may be a subject best left to my wife, as a member of the California Commission on the Arts. I did, however, want to pause for a minute to focus on the public confidence and government. This is an area of great concern to the judicial system as well.

The judicial branch places the highest priority on improving access to justice. In furtherance of that goal, the Judicial Council, the constitutional entity charged with oversight of the administration of justice, which I chair, has been very active in promoting activities to improve court/community outreach and communication.

A council advisory committee has already begun assisting courts in implementing projects to engage with and better respond to their local community. The council has adopted a standard of judicial administration urging judges to become more involved in their communities. Efforts to improve juror service and to provide better compensation for interpreters have already met with partial success. Courts are also experimenting with user-friendly kiosks, and limited legal assistance to assist pro per litigants, particularly in the family law arena. Our goal in pursuing these and many other related projects is to provide improved services, and thereby also to improve public confidence in the courts – and ultimately, our government as a whole.

Any public lawyer, serving in any segment of government, is, I am certain, keenly aware of the public's too-frequent skepticism about government. Yet our state is most fortunate that so many skilled and capable individuals continue to serve with dedication and creativity at every level. They all deserve our gratitude and our admiration.

The award that JoAnne Speers is receiving today from the Public Law Section of the State Bar is recognition by her peers of her extraordinary contributions in this very important area of legal and public life. Her background demonstrates that the scope of a public lawyer's contributions can be broad, varied, and creative. On behalf of the California judicial system, I would like to thank and congratulate you on this great achievement."

JoAnne Speer's Remarks: Instruments of Collective Action at a Human Scale

"Thank you very much Chief Justice George and to the Public Law Section Executive Committee for this tremendous honor.

I know it has become a tradition for the recipient of this award to share their thoughts on what the practice of public law and this honor means to them. Finding the words to express what each means to me has been quite a challenge.

What This Award Celebrates: Collective Action For the Betterment of Municipal Law

Part of the reason for this challenge is that my role as a public lawyer with the League of California Cities is really rather unique. This is because the League's role is rather unique. The League is a vehicle, powered by its members. Without this fuel,

the League would be much like my 66 Mustang that rarely finds itself out of the garage.

For example, although I write Chief Justice George more letters in a year than I do to my family, all of the League's full-blown appellate amicus briefs are prepared on a pro bono basis by public law attorneys throughout the state.

Another example is the League's pride and joy—the California Municipal Law Handbook. This 1300 page tome on municipal law is the result of literally hundreds of public law attorneys' efforts and the list of attorneys contributing to this work grows each year with the annual update process.

The new regulatory takings educational effort (which has just been funded by the Packard Foundation for $450,000 over two years) was the grassroots concept of a group of public agency attorneys and others concerned about the development and lack of clarity in the law in this area. This group labored some 23 months (and through just about as many drafts of grant proposals) to make the project a reality.

The result of all of this is that I have come to know well the capabilities and contributions of many public lawyers. There are literally dozens of attorneys—many of whom are in this room—who qualify not only as public lawyers of the year, but of the century.

To the extent that this award reflects my work for the League, the success of my efforts have depended heavily on these attorneys' willingness to contribute their time and expertise. More than anything else, I truly believe this award recognizes all of our efforts and the value of collaboration.

What Public Law Means to Me: Promoting the Efficacy of Collective Action at the Local Level

Having said this, I cannot tell you how much it means to me to be recognized as a public lawyer and that my colleagues would believe my work with the League has made some kind of contribution to the practice of public law. The reason it means so much to me is I care very deeply about what public agencies—particularly cities—do and what the League does to help cities serve their communities.

This is because I think cities are very important in our system of government. In a 1997 Western City series about home rule and the value of cities, Professor John Kirlin of USC noted that cities are instruments of collective action and expressions of collective visions on a human scale. If you think about it, cities are the way in which we as individuals can better ourselves and our immediate environments. Nearly everything cities do relate to these two forms of betterment—arts and cultural programs, economic development efforts, public safety services, land use planning and the ongoing and sometimes discouraging efforts to muster adequate financial resources to respond effectively to the public's needs.

The ability of cities to serve this role is critical for the public. Professor Kirlin also notes that, for individuals, the costs of seeking action at the state and national levels are simply prohibitive. Those institutions are geographically remote from us and tend to respond to influences that most of us as individuals are unable to match. Our ability to actually make a difference within those forums is very limited. Professor Kirlin poses an important rhetorical question: without cities, how would citizens have the means to influence the important dimensions of their lives?

The means to influence important dimensions of citizens' lives is what local control is all about. And the significance of this fundamental democratic principle is why the California Constitution recognizes and protects the intrinsic value of municipal home rule for charter cities—even in the face of conflicting and/or unclear state law. In fact, the importance of keeping public agency decisions as close to the people as possible is also why courts should be highly discerning in deciding even ordinary preemption cases. Local decisions should only be overridden when the Legislature has clearly stated its intention and justification for doing so.

The League and Cities: Instruments for Expressing Collective Visions

Being able to advocate on behalf of such worthy principles is truly a privilege. Being able to work with such a fine group of fellow public lawyers in so doing is the professional equivalent of nirvana.

Just as the priorities cities set for themselves are the collective expressions of vision for their communities, the League is municipal lawyers' instrument for expressing a collective vision about the betterment of public law. This is true whether the undertaking is to protect local control or create tools to help city officials respond effectively and knowledgeably to their community's needs.

Thank you all for sharing this very special evening with me. I have learned so much from the attorneys that help the League with its work and I know I have so much more to learn. I am grateful for the opportunity to serve as a public lawyer and I am grateful for the very much appreciated pat on the back that this award represents. Again, it means more than words truly can express."

Joanne Speers

Public Lawyer of the Year Award

2000

Do you know a public law practitioner who deserves special recognition because of outstanding services to the public?

If so, that person could be the recipient of the Public Law Section's "2000 Outstanding Public Law Practitioner" award because of your nomination.

Each year the Public Law Section honors a public lawyer selected by the Public Law Executive Committee from nominations sent in by members of the Public Law Section, the State Bar, and the public at large.

For the award, the Public Law Executive Committee is looking for an active, practicing public lawyer who meets the following criteria:

1. at least 5 years of recent, continuous practice in public law
2. an exemplary record and reputation in the legal community
3. the highest ethical standards

Rather than a political figure or headliner, the ideal recipient would be a public law practitioner who has quietly excelled in his or her public service. Just as the Public Law Executive Committee supports the goal of ethnic diversity in the membership and leadership of the State Bar, a goal in selecting the 2000 Outstanding Public Law Practitioner will be to ensure that the achievements of all outstanding members of the Bar who practice Public law, especially women and people of color, are carefully considered.

Nominations are now being accepted. The 2000 Outstanding Public Law Practitioner award will be presented at the Annual State Bar Convention in San Diego in September 2000.

Send nominations, no later than 12:00 midnight, June 1, 2000, to:

Tricia Horan
Public Law Section
State Bar of California
180 Howard Street,
San Francisco, CA 94102-4498.

To nominate an individual for this award, fill out the official nomination form below.

Nominee's Name: _____

Nominator's Name: _____ **Place of Business:** _____

Telephone Number: _____ **Years of Public Law Practice:** _____

Brief Statement why Nominee deserves recognition: _____

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The Essential Role of Foreclosure in the Maintenance of Special Assessment Districts

Or "How to Avoid the Lure of the Ostrich Fund"

*By Benjamin P. Fay**

The special assessment district is a useful tool for financing public improvements, particularly as other sources of funding become harder to find. But if not properly managed, assessment districts can cause many problems for the city that created them, including lawsuits and injury to the city's credit rating.[1] These problems arise when properties in the district default on their assessment installments, which eventually causes the district to default on its bond payments. The primary tool for avoiding this trouble is judicial foreclosure, but if not handled properly, foreclosure can be ineffective and politically difficult.[2]

A. The Basic Structure of a Special Assessment District

Most special assessment districts are created under either the Municipal Improvement Act of 1913,[3] the Improvement Act of 1911,[4] the Landscaping and Lighting Act of 1972,[5] or the Benefit Assessment Act of 1982.[6] If the purpose of the assessment district includes the construction of an improvement, bonds will usually need to be issued. First, assessments are levied on the properties that will benefit from the improvement. For the assessments that are not paid-off in full, bonds are issued, secured by the assessments. The bonds are usually issued under the Improvement Bond Act of 1915.[7] The sale of the bonds raises the cash needed to build the improvements, and the bonds are then paid off by the property owners through a series of biannual installment payments on the assessments. These installment payments are collected for the city by the county along with the property taxes.

B. The Problem: Using the "Ostrich Fund" to Postpone Foreclosure

1. The Foreclosure Covenant

One of the attractions of special assessment financing, particularly for developers, is the low interest rate obtained by the bonds. This low rate is partly due to the security of the assessment lien: it is on a parity with property taxes; it is superior to all non-tax, non-assessment liens; and it is only inferior to already-existing special assessment liens.[8] This security, however, is only guaranteed by the power to foreclose if the assessments are not paid. Consequently, every bond issue contains a foreclosure covenant that obligates the city to commence judicial foreclosure on properties that are delinquent on their assessment installments.

The exact terms of a foreclosure covenant will vary from one bond issue to another. Some require automatic foreclosure on a parcel for which an assessment installment has been delinquent for a certain amount of time, while others only require foreclosure once the delinquency rate for the entire district hits a certain level. But one trait that most foreclosure covenants have in common is a requirement to begin foreclosure before it really appears to be necessary i.e., when there might only be $200 due on a property worth $30,000. This can put the city in a quandary. Although the legal and administrative costs of a foreclosure are recoverable from the property owner, and therefore the foreclosure should not cost the city anything, there may be a political cost involved.[9] If an overbearing foreclosure attorney threatens to kick people out of their homes and runs up thousands of dollars in legal fees on two hundred dollar delinquencies, complaints will flow into city hall. This could jeopardize the chances of creating more assessment districts in the future, as well as bring down the ire of the city council on the city staff who manage the assessment district. This potential adverse effect sometime leads the city staff to avoid foreclosure until there is no other option. And, at least at first, there is always another option: The Special Reserve Fund.

2. The Special Reserve Fund B a.k.a. the "Ostrich Fund"

The Special Reserve Fund is an important tool in the management of an assessment district,[10] but it should not be used as a permanent crutch to avoid chronic problems in the assessment district. It is an extra fund created for the specific purpose of enabling the city to meet its bond payments, even when some of the assessment installments are not paid. The assessment installments are generally scheduled to match the bond payments. If everybody in the district pays their installments for the year, there will be enough money to make the bond payments for that year. But if some people do not pay their taxes, then there will be a shortfall and the city will partially default on its bond payments. It is for this predictable eventuality (that some people will not pay their taxes) that the Special Reserve Fund is intended. When assessment installments are not paid, the city can dip into the Special Reserve Fund to make up the difference and meet the bond payments.

The money in the Special Reserve Fund comes from an extra initial assessment on the properties in the district of up to ten percent of the total assessment needed for the improvements. For example, if the improvements funded by the district will cost $100 million, then the properties in the assessment

district will be assessed $110 million.[11] $100 million will go to the improvement fund to build the improvements, and $10 million will go to the Special Reserve Fund.

The use of money from the Special Reserve Fund to make bond payments is meant, however, only to be temporary, until the city can compel the delinquent property owners to pay their delinquencies, generally through foreclosure, and thereby replenish the fund. Ideally, the extra ten percent in the Special Reserve Fund will eventually be used to end the bond run early by calling the last bonds.[12] In this way, as long as the Special Reserve Fund is not depleted, the property-owners will recoup the extra ten percent assessment that they were initially assessed.

All too often, however, a city will rely too much on the Special Reserve Fund, using it not just as temporary means to maintain the stream of bond payments, but as a means to avoid altogether the unpleasantness of foreclosure by using the fund to indefinitely make the bond payments for delinquent properties. It becomes the "Ostrich Fund": a means by which the city can stick its head in the sand and ignore problems with its assessment district. But this practice not only cheats the other property-owners in the district by forcing them to finance the delinquent properties, it also risks causing a bond default if the Special Reserve Fund runs out. By the time the Special Reserve Fund runs dry, some of the delinquent properties may have been delinquent for so long that the underlying property will be worth less than the total delinquency. This is known as the property being "upside down." For example, a property worth only $10,000 might have a delinquency worth $12,000. When this occurs the property cannot be sold following judicial foreclosure because the property will have a negative market value. The city will not recover the delinquencies, and the city will remain in default on the bond payments. This can expose the city to lawsuits by the bondholders and can damage the city's credit rating which will hinder any future attempts to issue bonds.

C. The Remedy: Inform the City Council; Monitor the Properties; and Work Closely with Foreclosure Counsel

The problem of upside-down properties cannot altogether be avoided. There will always be people who do not pay their taxes, and there will sometimes be unforseen occurrences that cause property values to drop precipitously and cause properties to go upside down i.e., economic recessions, toxic contamination, or landslides. Moreover, foreclosures are always unpleasant, and complaints will always be made about them. But there are measures that can be taken to minimize these risks and to insulate the city from liability for a breach of a foreclosure covenant: (1) keep the city council informed of the possible need for foreclosure, (2) identify and monitor potential problem properties, and (3) work closely with your foreclosure counsel.

1. Inform the City Council

The city council should be made aware of the necessary role of foreclosure in the maintenance of an assessment district. They need to know of the risks to the city if foreclosure is not instigated when necessary, but they also need to be ready for any political issues that might arise from foreclosure. If the council is prepared for the difficult decisions before they arise, they will be more likely to make the necessary decisions and not put them off.

To begin with, when an assessment district is formed, the city's obligations under the foreclosure covenant should be clearly outlined to the city council. If delinquencies occur and the foreclosure covenant is triggered, the council should be informed and the potential liability for breaching the foreclosure covenant should be spelled out. The unfairness of property owners having to pay for their neighbors' delinquencies (which is the practical effect of paying delinquencies out of the Special Reserve Fund without later replenishing the fund through foreclosure) should also be explained. And the council should be warned of the political heat that may arise from foreclosures, although there is little doubt that the council will already be cognizant of this aspect.

2. Identify Problem Properties

Complying with the exact terms of a foreclosure covenant can be difficult because some foreclosure covenants require foreclosure even when there is only a relatively low rate of delinquency. Due to the constraints of practicality, some districts will often be in violation of their foreclosure covenants. In this situation, the most important thing is to avoid letting these violations become material, which only occurs if the district defaults on its bond payments. Default becomes incurable when the delinquencies are allowed to continue for so long that by the time foreclosure is instigated the properties are upside down.

There are certain factors, however, that indicate when a parcel is in danger of becoming upside down. The most important factor is whether the parcel is improved. If a parcel has a house or a business on it, its value is usually such that it is very unlikely to go upside down.[13] Moreover, there are often mortgages on improved parcels, and because foreclosure will wipe out the lien securing a mortgage, the bank holding a mortgage will usually step in and pay the delinquency. On the other hand, if a parcel remains unimproved, then the likelihood of it going upside down increases dramatically. Fortunately, unimproved parcels are usually the easiest, politically speaking, to foreclose because nobody is being turned out of a house or a business.

Properties owned by developers should also be monitored. Upside down parcels are more likely to occur when an assessment district has been created to build the basic infrastructure for a new development, and the developer fails to carry through with the entire development. If there is a drop in property values, the developer may find that it is no longer economically feasible to develop the unimproved parcels, and the developer will simply walk away from the properties, leaving the city with a defaulting assessment district. Therefore, to protect the city, if unimproved parcels owned by a developer go delinquent, the city should immediately consider foreclosure.

3. Work Closely With Your Foreclosure Counsel

Once the decision to foreclose has been made, carefully select your foreclosure counsel. This can significantly affect the success of your foreclosures, both legally and politically. Try to find counsel who is familiar with the political aspects of foreclosure, particularly if you will be foreclosing on occupied houses or businesses. Some litigators are too single-minded in their pursuit of foreclosure and do not appreciate the political ramifications of what they are doing.

Discuss strategy with your foreclosure counsel. Do you want to proceed quickly to a complaint? This may be appropriate with a defendant developer against whom you are proceeding for a second or third time and who only pays once a complaint is filed. On the other hand, when proceeding against homeowners, you initially may want to use a softer touch and begin with warning letters that give them a chance to cure their delinquencies while the legal fees are relatively low. This provides political cover and insulates the city from later complaints that the legal fees are too high.

Lastly, payment structures can be flexible.

Although the attorney's fees and legal costs of a foreclosure should generally be recovered from the property owner, some foreclosure counsel require a city to pay these costs up front and then have the city be reimbursed by the property owner. But if obtaining the funds to front these fees is a problem, the city should negotiate the payment structure with foreclosure counsel to minimize the city's initial out-of-pocket costs.[14]

D. Conclusion

Foreclosure is an unpleasant but necessary aspect of special assessment district maintenance. By addressing it head on, however, a city can often avoid the more difficult problems that can arise from delinquencies.

Endnotes

* Benjamin P. Fay is a Senior Associate in the Revenue and Taxation Practice Group at Meyers, Nave, Riback, Silver & Wilson, and manages the firm's special assessment foreclosure group.

1 Throughout this article, I will use the term "city" when referring to the public entity that creates an assessment district. Assessment districts, however, are also created by counties, joint powers authorities, utility districts, and other local public entities. The discussion in this article applies equally to these other entities.

2 This article addresses assessment district foreclosures. The issues that will be discussed, however, are also relevant to the administration of Melloo-Roos Community Facility Districts.

3 Section 10000 et seq. of the Streets and Highways Code.

4 Section 5000 et seq. of the Streets and Highways Code.

5 Section 22500 et seq. of the Streets and Highways Code.

6 Section 54703 et seq. of the Government Code.

7 Section 8500 et seq. of the Streets and Highways Code.

8 E.g., section 10428 of the Street and Highways Code. Another reason for the low interest rates on these bonds is, of course, their tax benefits.

9 Although the attorney's fees for a foreclosure are generally not proportional to the delinquency amount, i.e. it takes roughly the same amount of work to foreclose on $500 as on $10,000, when the delinquent amount and the attorney's fees are far out of proportion, the perception arises that the fees are unreasonable. This can induce a court not to award all of the fees, in which case the attorney will turn to the city for payment of the balance. Consequently, when the delinquent amounts are very low, foreclosure may cost the city some fees.

10 Streets and Highways Code section 8880 et seq.

11 The total assessment will actually be more to cover the cost of the bond issue and the other costs of the district. But for the purposes of this example, we will only consider the cost of the improvement and the cost of the Special Reserve Fund.

12 Section 8885 of the Streets and Highways Code.

13 Because assessments must be allocated to parcels by the amount of benefit conferred to the parcel by the assessment district, not by the value of the parcel, an assessment on an unimproved parcel is usually a higher percentage of the parcel's value than is an assessment on an improved parcel.

14 It should be kept in mind, however, that the city will usually be obligated to cover any fees that cannot be recovered in the foreclosure, particularly if the parcels are upside down.

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